# Department of Justice

STATEMENT

OF

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UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

CONCERNING

OVERSIGHT HEARING ON "WHITE COLLAR ENFORCEMENT (PART I): ATTORNEY-CLIENT PRIVILEGE AND CORPORATE WAIVERS"

PRESENTED ON

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Mr. Chairman, Ranking Member Scott, and members of the subcommittee, thank you for the opportunity to appear before you today.

President Bush, this Congress, and the American people have all embraced a zero tolerance policy when it comes to corporate fraud. In passing the landmark Sarbanes-Oxley legislation in 2002, Congress gave the Department clear marching orders: prosecute fully those who would use their positions of power and influence in corporate America to enrich themselves unlawfully, restoring confidence in our financial markets.

We have done exactly that. Specifically, Mr. Chairman, from July 2002 through December 2005, the Department secured more than 900 corporate fraud convictions, including 85 presidents, 82 CEOs, 40 CFOs, 14 COOs, 17 corporate counsel or attorneys, and 98 vice-presidents, as well as millions of dollars in damages for victims of fraud.

Much of our success depends on our ability to secure cooperation. As Chairman Sensenbrenner noted recently - quote -

> By encouraging and rewarding corporate cooperation, our laws serve the public interest in promoting corporate compliance, minimizing use of our enforcement resources, and leading to the prosecution and punishment of the most culpable actors.

The Department's approach in corporate fraud cases is set forth in the so-called "Thompson Memo." Pursuant to that Memorandum, the degree to which a corporation cooperates with a criminal investigation may be considered by prosecutors as one factor when determining whether or not to charge the corporation with criminal misconduct.

Cooperation in turn depends on -- and here I quote -- "the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection."

Some critics have suggested that the Department is contemptuous of legal privileges. Nothing could be further from the truth. We recognize that the ability to communicate freely with counsel can serve legitimate and important functions and encourage responsible corporate stewardship.

At the same time, we all recognize that corporate fraud is often highly difficult to detect. Indeed, in recent years we have witnessed a series of highly complex corporate scandals, which would have been difficult to prosecute in a timely and efficient manner without corporate cooperation, including in some instances the waiver of privileges.

The Thompson memo carefully balances the legitimate interests furthered by the privilege, with the societal benefits of rigorous enforcement of the laws supporting ethical standards of conduct.

The so-called "McCallum Memo," issued during my tenure as Acting Deputy Attorney General last year, adds to this balance. The McCallum Memo first ensures that no federal prosecutor may request a waiver without supervisory review. Second, it requires each U.S. Attorney's Office to institute a written waiver review policy governing such requests.

Mr. Chairman, I recognize that despite these limitations there are some critics of the Department's approach. While I look forward to addressing specific concerns that Members of the Subcommittee may have about our policy during your questioning, let me make a few preliminary observations.

First, voluntary disclosure is but one factor in assessing cooperation, and cooperation in turn is but one factor among many considered in a charging decision. Disclosure thus is not required to obtain credit for cooperation in all cases; corporations may cooperate most readily without waiving anything simply by identifying the employees best situated to provide the government with relevant information. Nor can the government compel corporations to give waivers. Corporations are represented by sophisticated and accomplished counsel who are fully capable of calculating the benefit or harm of disclosure. Sometimes they agree; sometimes they do not. Whether to disclose information voluntarily always remains the corporation's choice. And in fact, voluntary disclosures are frequently initiated not by the government, but by corporate counsel.

Second, under our process, waivers of privileges should not be "routinely" sought. Indeed, they should be sought based upon a need for timely, complete, and accurate information, and requested pursuant to established guidelines, and only with supervisory approval.

Third, our approach should not diminish a corporation's willingness to undertake internal investigations. Wholly apart from the government's criminal investigations, corporate management owes shareholders a fiduciary duty to investigate potential wrongdoing and to take corrective action. To the extent that shareholders are best served by timely internal investigation, responsible management will always do so.

Finally, in some jurisdictions, voluntary disclosure to the government waives privileges as to civil litigation plaintiffs seeking money damages, thus compounding the corporation's litigation risk. Addressing this concern, the Evidence Committee is currently considering a rule that would limit use by others of privileged materials voluntarily provided by a corporation in cooperation with a governmental investigation. We will watch that debate with interest.

In summation, Mr. Chairman, we believe that we have struck an appropriate balance between traditional privileges and the American people's legitimate law enforcement needs.

Thank you again for the opportunity to testify, and I look forward to your questions.